

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

In Re: Bair Hugger Forced Air) File No. 15-MD-2666
Warming Devices Products) (JNE/FLN)
Liability Litigation)
) January 18, 2018
) Minneapolis, Minnesota
) Courtroom 12W
) 9:30 a.m.
)

BEFORE THE HONORABLE JOAN N. ERICKSEN
UNITED STATES DISTRICT COURT JUDGE

THE HONORABLE FRANKLIN L. NOEL
UNITED STATES MAGISTRATE JUDGE

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P R O C E E D I N G S

(9:55 a.m.)

THE COURT: Good morning. Please be seated.

Judge Leary is unable to join us today because of a legal problem. He no longer has any business here.

Do we have our people on the phone? Let's see. Would someone on the phone say something?

UNIDENTIFIED SPEAKER: Good morning, Your Honor.

THE COURT: Thank you very much. We've been discussing the bellwether back and forth, and it struck us that it might be best to go through the non-bellwether matters that are on the agenda for today. And then, counsel, if you would come back and then we can have an informal discussion about what's the best way to proceed on the bellwether process. So that's what we've been doing and that's how we will proceed.

So let's just turn right to the joint agenda. And skipping over the bellwethers, we come to the motions to dismiss. Mr. Hulse, do you want to take the lead on that?

MR. HULSE: I will, Your Honor. Thank you.

THE COURT: I'll tell you what I've got drafted up here. And then maybe you can let me know how that...

MR. HULSE: Very good. And good morning.

THE COURT: And good morning to you. We're missing some people. Okay, where is your colleague?

1 MR. HULSE: Mr. Blackwell is in trial.

2 THE COURT: Is he up with that Starkey thing I've
3 about reading about?

4 MR. HULSE: No, it's a California trial. L.A.
5 Superior Court.

6 THE COURT: Is this the one where he got called in
7 at the last minute?

8 MR. HULSE: They all fit that bill.

9 MAGISTRATE JUDGE NOEL: I think this is one where
10 it's warmer in California than it is in Minnesota, and so
11 should I go to the status conference in Minnesota or the
12 trial in California?

13 MR. HULSE: He does have impeccable timing in his
14 trial assignments when it comes to the weather. This one
15 Your Honors may know that with L.A. Superior Court, you
16 don't know what courthouse you're going to be in until
17 you're actually called for trial. So you just have to sort
18 of book a centrally located hotel and hope it's close.

19 THE COURT: Sounds like a good idea if you want to
20 torture the jury. Okay. So that's him. Ms. Zimmerman?

21 MS. ZIMMERMAN: Thank you, Your Honors. You may
22 notice we have fewer people here as well. Mr. Gordon is a
23 victim of the snowstorm through Atlanta, which has basically
24 shut down that airport. And Ms. Conlin is covering a
25 deposition for one of here partners whose wife unexpectedly

1 had their baby early, so she sends her regrets her as well,
2 but she's taking a deposition that she is hopefully now
3 prepared for in New York.

4 MAGISTRATE JUDGE NOEL: Okay, thank you.

5 THE COURT: All right. So I have a draft order
6 here with respect to Grooms, Johnson, Gilbert Garcia,
7 Gruetzmacher, Maria Garcia, Petrakis, Sellers, Allen Graves,
8 Morris, Maxheimer, Saylor, and Schapansky. That excludes
9 Prince, so my thought was we find out whether the issue with
10 the lawyer switch, whether they ever heard -- whether Prince
11 is going to go forward separately.

12 But on the others, I have a plan here to deny the
13 motions to dismiss as moot with respect to Morris and
14 Schapansky on the grounds that I think those are taken care
15 of without court intervention.

16 MR. HULSE: That's correct, Your Honor.

17 THE COURT: And then denying without prejudice to
18 renew on Gruetzmacher and Maria Garcia and that has to do
19 with the identification. Maria Garcia is identified as
20 Guzman, and Gruetzmacher's case is listed as 17CV00988, even
21 though it's 998.

22 MR. HULSE: Right, that is a typo.

23 THE COURT: So I just thought we would deny it for
24 now and give you a chance to fix it up and make sure that we
25 still want to do that. And then dismiss with prejudice

1 Grooms, Johnson. That's 17CV640. Grooms was 343. Gilbert
2 Garcia, that's 711. Petrakis is 1082. Sellers is 17CV1879.
3 Allen, 2738. Graves, 2747. Maxheimer, 2763. And Saylor,
4 2892. That's my proposal. I don't know if that saves you
5 any time.

6 MR. HULSE: You've left me with nothing to say,
7 Your Honor.

8 THE COURT: Okay. So, Ms. Zimmerman, I guess I'm
9 to you. This is my draft here. Do you have any problems
10 with that?

11 MS. ZIMMERMAN: I think that given Your Honor has
12 clarified that the motions are denied on Morris and
13 Schapansky and that they have the opportunity to fix the
14 typos on Maria Garcia, and is it Gruetzmacher? I think that
15 that is the remainder of consistent with what we've heard.

16 I know that the responses that were filed in
17 response to the Defendant's motion to dismiss were only by
18 three firms. One was the Prince matter. I don't know if
19 Bernstein Liebhard is on the phone. It's my understanding
20 anyways though that a PFS has been served now and that that
21 issue I think is off the table.

22 THE COURT: Okay. So I've unmuted the phone. Can
23 we hear from counsel representing the plaintiff in the
24 Prince matter? Okay, somebody, even if you don't represent
25 them, can you say something so that I'm sure the reason I'm

1 not hearing anything is that the lawyer is not there as
2 opposed to there being some technological issue.

3 MS. THOMAS: Yes, Your Honor. Lisa Thomas from
4 Colling Gilbert Wright & Carter. Can you hear me?

5 THE COURT: Okay, I hear something so thank you.

6 MS. ZIMMERMAN: And my understanding, Your Honor,
7 then is that the Bernstein Liebhard firm did respond to the
8 motion to dismiss and indicated that the fact sheet was
9 served on January 12 of this year. I think that there was
10 at least some issue with respect to the client retaining two
11 firms, and my understanding anyways is that the Bernstein
12 Liebhard firm response asks that the case not be dismissed.

13 If the other responses that were filed all
14 indicated that the plaintiffs, despite the plaintiffs' firms
15 best efforts were nonresponsive, and I know that there was
16 one firm or one case that the Kennedy Hodges firm represents
17 the plaintiffs is Sellers, and they have requested in their
18 response a 60-day extension to get the plaintiff fact sheet
19 completed, and to the extent that they have anything to add
20 to that I'm sure that they will.

21 THE COURT: Okay, and is that 1879?

22 MS. ZIMMERMAN: Yes, that's 1879, Your Honor.

23 MR. ASSAAD: Your Honor, we have nothing to add.
24 We have been unable to reach the client. We would ask for
25 60 days.

1 THE COURT: Very well. Well, then this morning I
2 will sign this order that we've got.

3 MR. HULSE: Thank you, Your Honor.

4 THE COURT: Okay. Thank you, Mr. Hulse.

5 Okay, now, update on the number and status of
6 cases?

7 MS. YOUNG: Nothing to add there from the
8 defendants.

9 MS. ZIMMERMAN: And, Your Honor, from the
10 plaintiffs' perspective, I was provided this updated number
11 from the David Szerlag at the Pritzker firm. As of
12 yesterday, there are 4,466 active federal Bair Hugger cases
13 pending in this MDL. So about another 260 or so odd cases
14 since this report went in.

15 THE COURT: All right. And overview of related
16 state proceedings other than the Minnesota one? We do miss
17 Judge Leary I must say.

18 MS. AHMANN: Your Honor, I don't think we have
19 anything to add other than what is in the papers. The
20 Rodriguez case is still on for trial, but we're going to be
21 working with the parties and the Court to get that moved.

22 THE COURT: Let me know if you need any help.

23 MS. AHMANN: We'll keep that in mind.

24 MS. ZIMMERMAN: And, Your Honor, the plaintiffs
25 have nothing to add other than we intend to appeal but.

1 THE COURT: And nothing to add on the other state
2 cases?

3 MS. ZIMMERMAN: Correct.

4 THE COURT: Is that true of Canada as well?

5 MS. YOUNG: Yes, Your Honor, nothing to add.

6 MS. ZIMMERMAN: Yes, Your Honor.

7 THE COURT: Item Number 6, pretrial orders, I
8 don't have anything.

9 MS. ZIMMERMAN: The only proposals, Your Honor,
10 with the competing proposals on the bellwether repopulation,
11 and we'll discuss that with Your Honors.

12 THE COURT: Yes. Is there anything else that we
13 should discuss while we're all here together?

14 MR. GOSS: Hello, Your Honor. Peter Goss here.
15 We have an issue with respect to Dr. Elgobashi.

16 MAGISTRATE JUDGE NOEL: Can I just interrupt for a
17 second? Either speak into the microphone on the table or
18 come up to the podium because the folks on the phone I think
19 are not hearing you.

20 MR. GOSS: Thank you. So the parties have worked
21 out the deposition date with respect to Dr. Elgobashi. It
22 looks like we're going to forward on Saturday, February
23 10th. And then Dr. Abraham, who is the defense fluid
24 dynamic expert, he can go on the 15th. So we've got the
25 deposition dates set.

1 The bigger issue is that Dr. Elgobashi is working
2 on a new CFD, and this one will be tailored to the Model
3 505. His first CFD that we reviewed in the Daubert hearings
4 involve the Model 750. The Model 505 has appreciably lower
5 air flow. So we've been informed that he's working on a new
6 CFD, that there is going to be a supplemental report. We
7 don't know when we're going to get it.

8 THE COURT: If I remember, Dr. Elgobashi's report
9 from before, it takes a long time to put these together.

10 MR. GOSS: Right, it does, and knowing that it was
11 going to take a long time, it's our position that while they
12 knew that they ere going to have some 505 cases, and they
13 should have done this earlier, the reports were due on
14 November 27th, we put in our rebuttal reports on
15 December 16th. If we get a new CFD, we're going to need
16 some time for our expert to look at it, rebut it, and we're
17 very concerned that we're just not going to be able to hold
18 to the May 14th trial date if that happens. So our position
19 is that new CFD is untimely and ought not to be supplemented
20 for the Gareis case.

21 THE COURT: Is Gareis a 505?

22 MR. GOSS: Yes, Your Honor.

23 THE COURT: Oh, no. All right, we'll talk more
24 about that when we're talking about the bellwethers, shall
25 we?

1 MR. GOSS: That sounds great, Your Honor. Thank
2 you.

3 MS. ZIMMERMAN: Your Honor, may we respond at
4 least briefly?

5 THE COURT: Yes.

6 MS. ZIMMERMAN: So with respect to Dr. Elgobashi's
7 CFD, Your Honors have heard much evidence and argument about
8 the admissibility and reliability and relevance of his
9 reports. I will say that Dr. Elgobashi's report initially
10 on general causation addressed generally and principally the
11 750, but his report also addressed the 505. What was
12 actually put through the super computer was the 750.

13 And I will also update the Court that as of
14 January 9th, his paper was accepted for peer review
15 publication in the International Journal On Numerical
16 Methods in Biomedical Engineering, so his report is now a
17 peer reviewed publication as of last week.

18 THE COURT: Well, we'll deny summary judgment
19 then.

20 MS. ZIMMERMAN: Thank you. So at any rate, he did
21 serve his original general causation report. And just to
22 kind of recite the basic schedule or time frame to remind
23 the Court, the Gareis scheduling order came out on the 20th
24 of October. We then had a three-day hearing the next week,
25 and there was some argument about whether we might be able

1 to put additional numbers into this super computer. And so
2 given the argument and the questions from the Court,
3 Dr. Elgobashi started in early November putting all of the
4 same kind of numbers into the super computer to do the same
5 calculations for this LES CFD modelling.

6 As the Court is aware, it certainly takes a great
7 deal of time and the super computer, as I understand it, you
8 have to petition for time on these big machines. And from
9 the scientific community standpoint, you also have to
10 explain why your project merits use on these super
11 computers. His project is considered to have already been
12 solved because of the initial project on the 750. But so he
13 now is using a different super computer. It's slightly
14 slower. He has some preliminary reports back, and we expect
15 that the final modelling with the videos will be available
16 sometime in February, and he will supplement his report as
17 soon as he's able.

18 But the report that he did serve on November 27th
19 timely under the Court's scheduling order addressed the
20 calculations that he made and his opinion with respect to
21 the 505.

22 MAGISTRATE JUDGE NOEL: Is there any difference in
23 methodology or anything that he's doing in this report or is
24 it just different numbers.

25 MS. ZIMMERMAN: It's just different inputs, that's

1 it. That's the only thing that's different. And he has
2 provided a six-page report, I believe, with respect -- that
3 includes calculations. I'm sorry, it's a four-page report
4 with a cover page, so five pages, detailing the calculations
5 and essentially the boundary conditions and the inputs for
6 the 505, and what his professional opinion is with respect
7 to the 505 for Mr. Gareis' case. So that was provided in a
8 timely manner. The defendants certainly will be able to
9 depose him on that when it comes up. And if and when they
10 decide to bring a motion when he has a supplemental report
11 where they need to take an additional deposition, I presume
12 that that will be before the Court if and when they decide
13 to bring that motion. But we don't have a motion before us
14 right now.

15 I will add that they have submitted supplemental
16 expert reports on at least four or five of their experts as
17 well, particularly with respect to this FDA letter that Your
18 Honor has heard quite a bit about at the hearing in October.

19 THE COURT: It's a different super computer
20 though, so it's not just different numbers. It's different
21 numbers arrived at by a different --

22 MS. ZIMMERMAN: Technically, Your Honor, you're
23 right. But it would be kind of like if I used my Mac or if
24 I, you know, went and used one of your law clerk's computers
25 right now, it's still really accessing essentially Microsoft

1 Word.

2 THE COURT: Right, except that the information
3 we've had from him before talked a lot about that particular
4 super computer, and so what you're telling me now is that
5 that's not the one that he's using -- did you want to say
6 something?

7 MR. ASSAAD: Your Honor, I'm going to --

8 MS. ZIMMERMAN: So he was using the new numbers
9 but the same exact equations that have been provided and
10 disclosed in that they were run on a different computer, but
11 the calculations are still being done in the same exact
12 fashion, just by a different computer.

13 THE COURT: Okay.

14 MAGISTRATE JUDGE NOEL: Is it the plaintiffs'
15 intent to call Dr. Elgobashi live at the Gareis trial or to
16 offer deposition or video or something?

17 MS. ZIMMERMAN: We intend to call him live, Your
18 Honor.

19 THE COURT: Mr. Assaad, did you want to say
20 something about that? You seem very exercised about it, so
21 I want to be able to give you a chance to --

22 MR. ASSAAD: Well, just from a technical
23 standpoint, Your Honor, the super computer only solves the
24 problems. It's not different equations. It's not different
25 algorithms. The only thing that's changing to the 750 and

1 the 505 is one number, just one number, which is the flow
2 rate. It's a slower flow rate. Everything else is
3 identical, and the preliminary results so far are identical.
4 The only difference is instead of taking 26 seconds, it's at
5 40 seconds. The only change.

6 MS. ZIMMERMAN: We did bring copies of
7 Dr. Elgobashi's published peer review article, if the Court
8 would like to receive one. I have one for defense counsel
9 as well. I don't know if they've seen it yet, I'd be happy
10 to offer those to them.

11 THE COURT: I don't need it right now.

12 MR. GOSS: Could I have just one response?

13 THE COURT: Yes.

14 MR. GOSS: So just to be clear on what
15 Dr. Elgobashi said in his November 27th report, he expressed
16 that the result with the 505 will be the same, that it will
17 just take more time. And I understand that that's what he
18 expects. People, odds makers expect the Vikings to win in
19 Philadelphia on Sunday, I hope, but that's why we play the
20 game, and so we don't know what's going to happen until we
21 see it happen and that's what we want to see.

22 And the basis for our motion is not going to be a
23 rehash of what's wrong with the inputs with respect to the
24 temperature, velocity, it's actually going to be specific to
25 the Gareis OR, which had some very unique air flow features,

1 and we're hearing for the first time that those aren't
2 accounted for in this model. We're going to need time to
3 explore this with him in order to bring our case specific
4 Daubert motion. And, again, I'm concerned that if we get a
5 report in mid-February, then we bring a Daubert motion, you
6 know, as soon as we can after that, it's still going to
7 effect our trial date of May 14th.

8 THE COURT: Nothing else for us to say about that
9 right now, I don't think.

10 All right. We will then conclude the hearing and
11 that frees up the folks who are on the phone. And, counsel,
12 please come back to chambers so that we can make a plan for
13 the bellwether repopulation. We're in recess.

14 (Court adjourned at 10:16 a.m.)

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16 * * *

17
18 I, Maria V. Weinbeck, certify that the foregoing is
19 a correct transcript from the record of proceedings in the
20 above-entitled matter.

21
22 Certified by: s/ Maria V. Weinbeck

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